

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

EFREN SALOMON,

Defendant and Appellant.

2d Crim. No. B292680  
(Super. Ct. No. 2015036032)  
(Ventura County)

Efren Salomon appeals a judgment following conviction of conspiracy to commit an unlawful firearm transfer, unlawful possession of a firearm, and unlawful possession of ammunition, with findings that the conspiracy was committed to benefit a criminal street gang, and that he served two prior prison terms. (Pen. Code, §§ 182, subd. (a)(1), 27545, 29800, subd. (a)(1), 30305, subd. (a)(1), 186.22, subd. (b)(1), 667.5, subd. (b).)<sup>1</sup> We affirm.

---

<sup>1</sup> All further statutory references are to the Penal Code unless stated otherwise.

This appeal concerns firearm violations that Salomon, a convicted felon, committed in part when he sought to obtain a firearm from a fellow “Loma Flats” criminal street gang member. The conversation between the two gang members and a text message sent from one to the other were recorded by a court-authorized wiretap. Salomon now challenges the sufficiency of evidence to support the criminal street gang enhancement of section 186.22, subdivision (b)(1).

### *FACTUAL AND PROCEDURAL HISTORY*

#### *Count 1*

Ventura County Sheriff’s Deputy Jeremy Bramlette received specialized training regarding wiretaps and had been involved in 20 to 25 wiretap investigations. On October 19, 2015, he obtained a court-authorized wiretap for a 30-day period for telephones belonging to Fidencio Hernandez and Erik Loya, among others. A wiretap interception computer program recorded the live calls and text messages authorized by this wiretap.

During the investigation, the wiretap intercepted two telephone calls to Hernandez from Salomon’s telephone number. At trial, the prosecutor played the recordings of the calls. Bramlette was familiar with Salomon’s voice and identified his voice in the recordings.

During the first call, Hernandez stated that he thought Salomon already had “a baby.” Salomon stated that he “need[ed] another one,” “[s]omething happened with [his] brother,” “like it’s not just gonna be one car,” “[w]e’re trying to get another one,” and his brother was “trying to buy one.” Hernandez then referred to Loya by his moniker, “Face.” Hernandez described Loya as possessing firearms and gave Loya’s telephone number to

Salomon. Hernandez stated that he and Loya had contributed to purchase four or five firearms; Salomon replied that he would contribute in the future. During the second telephone call, Hernandez asked Salomon if he had Loya's telephone number and recommended that Salomon call Loya.

The wiretap also intercepted a text message from Salomon to Hernandez, stating: "West up G. I really need to get ahold of baby real quick." Oxnard Police Officer Jose Velazquez testified that "West" was a greeting between Loma Flats street gang members. Velazquez also opined that "baby" referred to a firearm and that the conversation involved obtaining a second firearm to commit a crime of retaliation. Based upon Hernandez's and Loya's gang-related tattoos and admissions, among other factors, Velazquez opined that they were Loma Flats street gang members. Neither Hernandez nor Salomon were licensed firearm dealers.

*Counts 2, 3, and 4*

On November 12, 2015, Oxnard police officers searched Salomon's residence. They discovered a firearm in the bedroom that was not registered to anyone living at the residence. The bedroom contained only women's clothing and Salomon testified that the bedroom belonged to his mother.<sup>2</sup> (Count 2.)

Nearly one year later, Oxnard police officers stopped Salomon as he drove in Oxnard. They recovered a semi-automatic handgun from Salomon's waistband and 19 rounds of ammunition in a medicine bottle in the console of the vehicle. (Counts 3 & 4.)

---

<sup>2</sup> The jury acquitted Salomon of unlawful possession of a firearm regarding this firearm.

The parties stipulated at trial that Salomon had suffered a prior felony conviction.

*Evidence Regarding Loma Flats Street Gang*

Velazquez testified that he had experience and training regarding criminal street gangs, including the Loma Flats gang. He stated that the Loma Flats gang had approximately 30 members and that they were rivals to each of the Oxnard street gangs. Velazquez testified that the Loma Flats gang members referred to themselves as “West Side,” used “W” hand signs, and tattooed themselves with “Loma” and “LF,” among other tattoos.

Velazquez opined that Salomon was a member of the Loma Flats street gang and was known by the monikers, “Basik” and “Grizzly.” Salomon had a “LF” tattoo on his head, “Loma” on his throat, and “WS” on his left ear, among other tattoos. In 2009, Velazquez worked undercover and purchased a stolen vehicle from Salomon. Velazquez then knew Salomon as “Basik” and recalled that he had the “LF” tattoo on the top of his head.

Velazquez also testified that Hernandez and Loya were Loma Flats gang members. Hernandez and Loya bore gang tattoos and had admitted their gang membership to Velazquez.

Velazquez testified that the primary activities of the Loma Flats street gang included murder, identity theft, narcotic sales, stolen vehicles, and assault with a deadly weapon. He had participated in wire intercepts where Loma Flats gang members discussed narcotics sales, unlawful transfer of firearms, and planned shootings. Velazquez described predicate crimes committed by gang members, including crimes committed by Hernandez. Velazquez participated in the prior investigations of Hernandez for narcotics sales and unlawful transfer of firearms.

### *Defense Testimony*

Salomon testified that he was not an active Loma Flats street gang member. He stated that he contacted Hernandez “as an individual” but not as a gang member, to protect his younger brother. Salomon testified that “baby” was code for “firearm.” He stated that he did not request assistance from the gang, and denied involvement in any gang activity from 2015 until time of trial. Salomon also testified that his brother was not a street gang member.

The jury convicted Salomon of conspiracy to commit an unlawful firearm transfer, unlawful possession of a firearm, and unlawful possession of ammunition. (§§ 182, subd. (a)(1), 27545, 29800, subd. (a)(1), 30305, subd. (a)(1).) The jury also found that Salomon committed the conspiracy to benefit a criminal street gang. (§ 186.22, subd. (b)(1).) In a separate proceeding, Salomon admitted that he served two prior prison terms within the meaning of section 667.5, subdivision (b).

The trial court sentenced Salomon to a prison term of 10 years eight months, which included four years for the conspiracy count, eight months for the unlawful firearm possession count, four years for the criminal street gang enhancement, and two years for the prior prison term enhancements. The court imposed a concurrent sentence for count 3 and stayed sentence regarding count 4. The court also imposed a \$900 restitution fine, a \$900 parole revocation restitution fine (suspended), a \$120 court operations assessment, a \$90 criminal facilities assessment; and awarded Salomon 1,229 days of presentence custody credit. (§§ 1202.4, subd. (a), 1202.45, 1465.8, subd. (a); Gov. Code, § 70373.)

Salomon appeals and contends that insufficient evidence supports the scienter requirement of the gang enhancement finding. By supplemental briefing, Salomon also argues that the trial court erred by not determining his ability to pay prior to imposing fines and assessments at sentencing.

## *DISCUSSION*

### *I.*

Salomon contends that insufficient evidence exists that he committed conspiracy to commit an unlawful firearm transfer with the specific intent to benefit a criminal street gang. (§ 186.22, subd. (b)(1).) He asserts that he had only a personal motive, his brother was not a gang member, and there was no evidence of other gang member involvement in a hypothetical drive-by shooting.

Salomon relies upon *People v. Rios* (2013) 222 Cal.App.4th 542, 574 [evidence that gang member alone with firearm in stolen vehicle insufficient to support gang enhancement] and *People v. Ramon* (2009) 175 Cal.App.4th 843, 853 [evidence that two gang members in stolen vehicle with unregistered firearm insufficient to support gang enhancement].

In reviewing the sufficiency of evidence to support a conviction, we examine the entire record and draw all reasonable inferences therefrom in favor of the judgment to determine whether there is reasonable and credible evidence from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Brooks* (2017) 3 Cal.5th 1, 57; *People v. Johnson* (2015) 60 Cal.4th 966, 988.) Our review is the same in a prosecution primarily resting upon circumstantial evidence. (*People v. Rivera* (2019) 7 Cal.5th 306, 331.) We do not redetermine the weight of the evidence or the credibility of

witnesses. (*People v. Albillar* (2010) 51 Cal.4th 47, 60; *People v. Young* (2005) 34 Cal.4th 1149, 1181 [“Resolution of conflicts and inconsistencies in the testimony is the exclusive province of the trier of fact”].) We must accept logical inferences that the jury might have drawn from the evidence although we may have concluded otherwise. (*Rivera*, at p. 331.) “If the circumstances reasonably justify the trier of fact’s findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding.” (*Albillar*, at p. 60.) In our review, we focus upon the evidence that was presented, rather than evidence that might have been but was not presented. (*People v. Story* (2009) 45 Cal.4th 1282, 1299.)

The section 186.22, subdivision (b)(1) gang enhancement applies to felonies that were (1) committed for the benefit of, at the direction of, or in association with any criminal street gang, and (2) with the specific intent to promote, further, or assist in any criminal conduct by gang members. (*People v. Rivera, supra*, 7 Cal.5th 306, 331.) Not every crime committed by gang members is related to a gang for purposes of the enhancement. (*Ibid.*) The enhancement applies “ ‘when a defendant has personally committed a gang-related felony with the specific intent to aid members of that gang.’ ” (*Ibid.*)

The scienter requirement of section 186.22, subdivision (b)(1) is “unambiguous and applies to *any* criminal conduct, without a further requirement that the conduct be ‘apart from’ the criminal conduct underlying the offense of conviction sought to be enhanced.” (*People v. Albillar, supra*, 51 Cal.4th 47, 66.) Moreover, “if substantial evidence establishes that the defendant intended to and did commit the charged felony with known

members of a gang, the jury may fairly infer that the defendant had the specific intent to promote, further, or assist criminal conduct by those gang members.” (*Id.* at p. 68.)

Sufficient evidence and all reasonable inferences therefrom support the gang enhancement finding. The prosecutor presented evidence that Salomon was an active member of the Loma Flats street gang. He bore gang tattoos that referred to Loma Flats and contacted Hernandez, another gang member, to unlawfully purchase a firearm. Hernandez referred Salomon to Loya, yet another Loma Flats gang member. Neither Hernandez nor Salomon were licensed firearm dealers, and, as convicted felons, they were ineligible for licensing. (§ 27545 [sale or transfer of firearm must be through licensed firearms dealer].)<sup>3</sup> Salomon also offered to contribute to future purchases of firearms by Hernandez and Loya.

This evidence satisfies the scienter requirement of section 186.22, subdivision (b)(1). (*People v. Albillar, supra*, 51 Cal.4th 47, 66 [gang enhancement does not require proof of criminal conduct “apart from” the criminal conduct underlying the offense of conviction sought to be enhanced].) Indeed, section 27590, subdivision (b)(5) recognizes that a violation of the firearm transfer law may be additionally punished by the gang enhancement of section 186.22. It matters not that the prosecutor chose to argue a theory that Salomon contemplated a drive-by shooting. The jury was free to consider and apply the

---

<sup>3</sup> Section 27545 states: “Where neither party to the transaction holds a dealer’s license issued pursuant to Sections 26700 to 26915, inclusive, the parties to the transaction shall complete the sale, loan, or transfer of that firearm through a licensed firearms dealer pursuant to Chapter 5 (commencing with Section 28050).”



evidence to the properly given instruction regarding the gang enhancement and the charged crime. (CALCRIM No. 1401 [“Felony Committed for Benefit of Criminal Street Gang”].)

Moreover, Salomon informed Hernandez that there would be more than one vehicle, “it’s not just gonna be one car.” He also requested a “baby real quick” by text message. Velasquez testified that the primary activities of the Loma Flats street gang included murder and assault with a deadly weapon. He also opined that Salomon required a second firearm to commit a retaliatory crime. (*People v. Williams* (2016) 1 Cal.5th 1166, 1200 [expert may testify concerning generalized information to assist jurors in understanding case-specific facts]; *People v. Ferraez* (2003) 112 Cal.App.4th 925, 930 [“It is well settled that expert testimony about gang culture and habits is the type of evidence a jury may rely on to reach a . . . finding on a gang allegation”].) Velasquez also testified that gang members retaliated against rival gang members to seek revenge for an assault. This evidence and reasonable inferences therefrom support a finding that Salomon intended to promote or further criminal conduct apart from the unlawful transfer of a firearm. Although another reasonable inference may be drawn from the evidence, we may not substitute our inference for that drawn by the trier of fact.

## II.

Salomon contends that the trial court failed to determine his ability to pay before imposing fines and assessments at sentencing. He asserts that he has been denied due process of law and is entitled to a hearing to determine his ability to pay.

Salomon relies upon *People v. Dueñas* (2019) 30 Cal.App.5th 1157. In *Dueñas*, the court held that imposing assessments pursuant to section 1465.8, subdivision (a) (court

operations) and Government Code section 70373 (court facilities funding) without a hearing on the defendant's ability to pay violates due process of law pursuant to the federal and state constitutions. (*Dueñas*, at p. 1168.) Neither statute expressly prohibits the trial court from considering the defendant's ability to pay. Pursuant to section 1202.4, subdivisions (b)(1) and (c), the court is expressly prohibited from considering the defendant's ability to pay in imposing a restitution fine unless the fine imposed exceeds \$300. *Duenas* holds that the court must stay execution of the restitution fine unless or until the prosecutor demonstrates that the defendant has the ability to pay. (*Id.* at p. 1172.)

Here, the trial court imposed a \$120 assessment pursuant to section 1465.8, subdivision (a), a \$90 assessment pursuant to Government Code 70373, and a \$900 restitution fine pursuant to section 1202.4, subdivision (b). The court also imposed and suspended a \$900 parole revocation restitution fine. (§ 1202.45.)

Salomon did not object to these financial penalties in the trial court. His failure to challenge the assessments and fines imposed at sentencing precludes doing so on appeal. (*People v. Aguilar* (2015) 60 Cal.4th 862, 864 [challenge to probation-related costs and fees paid to trial counsel].) In *People v. Castellano* (2019) 33 Cal.App.5th 485, the court excused the defendant's failure to raise the issue in the trial court. *Castellano* reasoned that the defendant's challenge is based on a newly announced constitutional principle that could not have been reasonably anticipated at the time of trial. (*Id.* at p. 489.) *People v. Frandsen* (2019) 33 Cal.App.5th 1126 reached a different conclusion. (*Id.* at p. 1155 ["traditional and prudential virtue"

requires parties to raise issue in the trial court prior to seeking appellate review].)

It is understandable that trial counsel representing criminal defendants in cases prior to *Dueñas* were more concerned with issues of guilt and sentencing than in court assessments and restitution fines, particularly in the case before us with a sentence of 10 years eight months.

Nevertheless, as *Frandsen* points out, although this issue may have been slowly simmering on the backburner, it was there to be raised. Barragan has forfeited this argument. (*People v. Avila* (2009) 46 Cal.4th 680, 729 [defendant forfeits issue by failing to object to imposition of restitution fine based on inability to pay]; *People v. Gutierrez* (2019) 35 Cal.App.5th 1027, 1033 [forfeiture of ability-to-pay argument by failure to object], petn. for review filed July 18, 2019.) "Given that the defendant is in the best position to know whether he has the ability to pay, it is incumbent on him to object to the fine and demonstrate why it should not be imposed." (*People v. Frandsen, supra*, 33 Cal.App.5th 1126, 1154.)

The judgment is affirmed.

NOT TO BE PUBLISHED.

GILBERT, P. J.

I concur:

YEGAN, J.

TANGEMAN, J., Concurring and Dissenting:

I join with my colleagues as regards Part I of the majority opinion. But I disagree with their conclusion, in Part II, that Salomon forfeited his claim that he is entitled to a hearing on his ability to pay the fees imposed pursuant to Government Code section 70373 and Penal Code section 1465.8 because he did not object to those fees in the trial court.

At the time Salomon was sentenced, the cited statutes virtually precluded any objections to the imposition of the fees they mandated; thus, a due process objection would have been either futile or wholly unsupported by substantive law. I disagree that the result in *Dueñas* was somehow foreseeable.

As eloquently stated in *People v. Black* (2007) 41 Cal.4th 799, 812: “The circumstance that some attorneys may have had the foresight to raise this issue does not mean that competent and knowledgeable counsel reasonably could have been expected to have anticipated” the change in law. In *Black*, our Supreme Court held that there was no forfeiture where a defendant failed to object in the trial court that he was entitled to a jury trial on sentencing issues based on an argument later accepted by the United States Supreme Court in *Blakely v. Washington* (2004) 542 U.S. 296. This was so, held the court, even though the *Blakely* opinion relied on “longstanding precedent” (*id.* at p. 305).

Based on law in existence when Salomon was sentenced, *Dueñas* was surely as unforeseeable as was the holding in *Blakely*. Accordingly, I agree with and would follow *People v. Castellano* (2019) 33 Cal.App.5th 485, 489.

NOT TO BE PUBLISHED.

TANGEMAN, J.

Michele M. Castillo, Judge

Superior Court County of Ventura

---

Robert L. Hernandez, under appointment by the Court of  
Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief  
Assistant Attorney General, Lance E. Winters, Assistant  
Attorney General, Steven D. Matthews and Rama R. Maline,  
Deputy Attorneys General, for Plaintiff and Respondent.